Supreme Court, U.S.
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01-1082

IN THE

Supreme Court of the United States

WINDE THREADGILL,

Petitioner,

v.

MOOI U.S.A., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

DAVID E. LASKER
Counsel of Record
COLEMAN, HAWKS & EHLKE, S.C.
SHIRNEYS *for Petitioner*
ATTO 7 South Hamilton Street - Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

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(800)-3321 • (800) 359-6859

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REASONS FOR GRANTING THE WRIT

A Decision By The Supreme Court Will Resolve Lingering Ambiguity, And Conflict Among The Circuits, Regarding The Proper Construction And Application Of The Notice-Of-Right-To-Sue Provision Of Title VII And Will Clarify The Rights Of Aggrieved Parties Who Have Attorneys Of Record.

Respondent's Brief in Opposition (hereafter referred to as "response brief") does not address head-on the heart of the Petition: the issue of the necessity of serving the claimant's attorney of record when the notice of right to sue is issued. The respondent initiates its argument by citing the pertinent portion of the notice statute, 42 U.S.C. § 2000e-5(f)(1), with emphasis added in bold type. *See* response brief at 1 ("the Commission . . . shall so **notify the person aggrieved and within ninety days after the giving of such notice** a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .") The emphasis of that certain portion of the statute actually ducks the issue, or at least begs the question presented, in this case. What is meant by the statute's phrases "notify the person aggrieved" and "the giving of such notice," where the aggrieved party is represented by an attorney of record?

Petitioner contends that "such notice" is notice served upon the aggrieved party's attorney of record (instead of or in addition to the client), when there is an attorney of record. Without explicitly saying so, respondent appears to agree with the Seventh Circuit that service upon the attorney of record is "irrelevant." *Id.* at 6.

What is the harm in interpreting the statute to require service upon counsel of record? No one possibly could be hurt by such a rule. The wealth of litigation on the subject of

timeliness demonstrates the high stakes involved for the aggrieved party in meeting the 90-day deadline. The ruling requested by petitioner would protect claimants by ensuring that their lawyers can file timely actions under the statute. It would close the door on the only remaining ambiguity under the statute. It would not be unfair to any party.

None of the court of appeals decisions cited by respondent has facts comparable to the case at bar or raises the issue presented in the instant action. *See Seitzinger v. Reading Hosp. and Medical Center*, 165 F.3d 236 (3d Cir. 1999) (attorney received copy of notice); *Million v. Frank*, 47 F.3d 385 (10th Cir. 1995) (same); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) (same); *Noe v. Ward*, 754 F.2d 890 (10th Cir. 1985) (same); *Jones v. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984) (same); *Miller v. Runyon*, 77 F.3d 189 (7th Cir. 1996) (no mention of attorney); *Scholar v. Pacific Bell*, 963 F.2d 264 (9th Cir. 1992) (same); *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652 (4th Cir. 1987) (no counsel of record when notice issued); *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247 (5th Cir. 1985) (no mention of attorney); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984) (same); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983) (same).

The respondent concedes that there are circumstances in which failure to file suit within the 90-day period is excused. Response brief at 5. In the primary case respondent cites regarding that point, *Noe v. Ward*, the attorney *did* receive notice, albeit seven days later than the plaintiff. *Id.* at 6. Therefore, the attorney in that case still had 83 days to ensure that the action would be timely filed. Certainly, as this Court's decisions and the decisions in all the circuit courts would dictate, if complainant's counsel also receives the notice — or is the only one to receive the notice, the limitations period ends 90 days from the earliest date of

receipt either by the attorney or the client. However, in the case at bar, petitioner's attorney of record was not served notice and only gained actual notice long after 90 days from the date the notice was issued. He commenced suit within 90 days of first learning the notice had been issued.

In this case, the action should be deemed to be timely commenced. Respondent's argument that petitioner's position "is not supported by the statute," *see* response brief at 10, is incorrect. Construing the statute to require service upon the attorney of record, as well as construing the limitations period to be triggered when the notice is first received either by the attorney or the client, is entirely proper. Most of the circuits deem notice under the statute to be complete upon receipt of the notice, rather than on the date of issuance, despite the fact that the statute literally calls for suit to be commenced "within ninety days after *the giving* of such notice." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). Those decisions deem "the giving" of notice to occur when the notice is actually received, in order to be fair to the aggrieved party. To construe the statute's phrase "the Commission . . . shall . . . notify the person aggrieved" as requiring service upon the aggrieved person's attorney of record, where there is an attorney of record, instead of or in addition to the client, is equally sensible. It is a necessary construction of the statute in order to be fair to the aggrieved party. As the case at bar clearly demonstrates, *effective* notice to the person aggrieved, when the person has an attorney of record, *is* service upon the attorney.

The contention by respondent that petitioner's suggested construction of the statute is an impermissible "attempt to tether his argument to Rule 5(b) [of the Federal Rules of Civil Procedure]," *see* response brief at 11 n.2, is misguided. It was the Supreme Court, itself, that first turned to Fed. R. Civ. P. 5(b) as a guidepost critical to determining the

proper construction and application of the similar notice statute regarding the period of limitations applicable to federal employees, 42 U.S.C. § 2000e-16(c). *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92-93 (1990). *See* Petition for a Writ of Certiorari (hereafter referred to as "Petition") at 8-9, 13. Likewise, respondent's argument that there is no support in the EEOC's regulations or compliance manual, *see* response brief at 11, is erroneous. The EEOC's actual policies and procedures *do* require service upon the claimant's attorney of record. *See* Petition at 4, 13.

Moreover, any delay in filing the instant action should be excused because no notice was sent to petitioner's counsel, giving rise to the kind of unusual circumstances in which principles of equitable tolling apply. As the Third Circuit succinctly stated, "Under equitable tolling, plaintiffs may sue after the statutory time period for filing a complaint has expired if they have been prevented from filing in a timely manner due to sufficiently inequitable circumstances." *Seitzinger*, 165 F.3d at 240, *citing Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) and *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981). Respondent acknowledges that "the remedy of equitable tolling is reserved for situations in which the claimant has made a good faith error." Response brief at 12. This case falls within that reservation.

The only error that can be assigned to the petitioner is that he relied upon the government agency to act as it should, as was requested by his attorney, and relied upon his attorney to take the actions he was under contract to perform. Under the circumstances, any arguable "disregard of the notice" by the petitioner was warranted. He was misled into believing that he no longer had a duty, himself, to monitor the applicable period of limitations. To rely upon one's attorney of record is not a failure to exercise diligence in preserving one's legal rights.

CONCLUSION

For the foregoing reasons, petitioner requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

DAVID E. LASKER
Counsel of Record
SHNEIDMAN, HAWKS & EHLKE, S.C.
Attorneys for Petitioner
217 South Hamilton Street
Suite 400
Post Office Box 2155
Madison, Wisconsin 53701-2155
(608) 257-0040

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